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Introduction.—Law is on the march all the time. Its eminent function is now, with the shift from the watch-dog Government to the service State and the break-down of traditional values facing the challenges of modern times, mainly to serve as an instrument of social justice. Apropos the conditions in England, Sir Leslie Scarman, L.J., stated: "The social challenge arises from a combination of two recently emerged but fundamental social beliefs. The first is that men and women are not to be denied the opportunities of personal happiness, to be achieved not as others think fit but as they wish it. The second is that we are all entitled to the active protection of the State against the ills of poverty, disease and old age. The fair distribution of wealth among all members of society has become a human right as important to the law as the right to property"[1], Sir Leslie Scarman added: "Social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and the exposed, to provide them with financial and other support and with access to Courts, tribunals and other administrative agencies where their rights can be enforced". Sir Leslie Scarman would like Judges being activists and giving a sort of conceptual interpretation of social legislation. Another eminent legal luminary, Lord Devlin, however, projects a somewhat different approach. He is not in favour of "judicial creativity" or "judicial operation in advance of consensus". He would like Judges to be activists only in the sense of keeping pace with the popular will reflected and embodied in legislative enactments. He observes: "There is no reason why, given the policy, a Judge should not be a good activist law-maker", adding: "Social justice is above the law; it is a body of principles with which the law should conform. Social justice guides the law-maker; the law should guide the Judge. Judges are not concerned with social justice or rather they need not be more concerned with it than a good citizen should be; they are not professionally concerned"[1].

1. English Law—The New Dimension, Hamlyn Lectures, 1974.

The wind of change is leaving its impact in our country as well. It is increasingly recognised that though policies and law-making are essentially the functions of the legislature, in the interpretation of such laws Judges can play an activist role conformably to the spirit of the times. Though the cold letter of the law is rigid like a corpse it is in reviving the law by moulding and shaping it that the judicial conscience plays a most active role. The Supreme Court observed in one case[2]: "Judicial interpretation should not be imprisoned in verbalism. Words lose their thrust when read in vacuo". "The roots of the past, the foliage of the present and the seeds of the future must be within the ken of the activist Judge". In another case[3], the Supreme Court said: "Poverty is Society's malady and sympathy not sternness is the judicial response". It is pointed out that in interpreting the provisions of beneficial pieces of legislation like the Maternity Benefits Act, 1961, which is intended to achieve social justice to women workers the beneficient rule of construction which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by

1. Judges and Law-makers, Chorley Lecture 1974 delivered before the London School of Economics on 25-6-1975.

2. *Union of India* v. *Sankalchand Himatlal*, (1978) 1 S.C.J. 765.

3. *Babu Singh* v. *State of U.P.*, (1978)2 S.C.J. 135.

the Court[1]. A similar note is sounded by our High Court in *Velu Pandar* v. *Prakasam*[2]: "Having regard to the object sought to be achieved by the Act, that is, to give relief to indebted agriculturists, the construction of a provision in the Act can only be in furtherance of that object". In regard to interpreting the Madras Cultivating Tenants Protection Act, it was stated: "The Cultivating Tenants Protection Act is a beneficial enactment which has to be liberally construed in favour of the cultivating tenants by the civil Courts whenever an occasion arises"[3]. So also in regard to industrial law. it has been stated that the benefit of reasonable doubt on law and facts, if there be such doubt, must go to the weaker section, labour[4]. Through the interpretative process law is made by decisions to march, broadening from precedent to precedent.

In our system of jurisprudence, case law furnishes the bricks with which the edifice of law is built up. Judicial decisions are concerned with proved facts in particular cases and are focussed on specific issues arising out of them. They amplify the statutory provisions and often give the law where the statute is silent. Each Judge is in truth a builder contributing his few bricks and a little mortar and not unoften each case tells its own tale. An attempt is made herein to refer briefly to law's course of progress as reflected in the decisions reported in the columns of this Journal under some of the wellknown and fairly significant titles of law dealt with by our High Court.

Courts: Their jurisdiction, powers, and duties.—In *State of Tamil Nadu* v. *M/s. National Trading Co.*[5], it is made clear that the only Court competent to deal with contempt is the High Court and therefore, when the High Court dismissed a petition for contempt it cannot be said that the Court dismissed the same for defect of jurisdiction or other cause of a like nature. *V. O. C. I. W. Co-operative Housing Society* v. *Karuppuswami*[1] holds that the power of the Court under section 34 of the Arbitration Act to grant stay of suit necessarily includes by implication the power to modify, vary, rescind or set aside the order of stay, that the position of the Court as a trier of the suit is such that an irrevocable order of stay would stultify its own jurisdiction, that the stay of suit under section 34 being for a special purpose, namely to enable the parties to go to arbitration, once the fulfilment of that purpose is found to have become impossible the very basis for the continuance of the stay disappears, that the termination of the stay may be made without being moved by means of a formal application, and that when once it is found that the Court's power to take up the hearing of the suit is always there, there is no scope at all for putting the Court under a strait jacket of procedure, especially where there is no express provision prescribing that procedure. *Vasantha* v. *Pandian*[2], points out that even if the plaintiff by a mistake or by an inadvertent omission fails to make prayer for future mesne profits the Courts are not powerless as to granting the equitable relief for future mesne profits having regard to the circumstances of each case. *Union of India* v. *Ganesh Lal Bajaj*[3] expresses the view that rule 16 (1) of the Second Schedule to the Income-tax Act, 1961 meant that the civil Court was deprived of the jurisdiction to issue any process against any property of a defaulter in execution of a decree for payment of money after notice was served on the defaulter under rule 2.

Constitutional Law.—In *Miss Mary Varghese* v. *Principal, Jawaharlal Institute*[4], in language of rhapsody, it is held that the fundamental rights claimed under Part III of the Constitution, if they could be compared to a crown, each of the rights guaranteed therein is a priceless gem emitting its own radiance; one does not diminish or dullen the lustre of another; all of them conjointly add to the grandeur of the crown; Article 14

1. *Shah* v. *Presiding Officer Labour Court,* (1978) 2 M.L.J. (S.C.) 1.
2. (1978) 1 M.L.J. 141, 144.
3. *Ganesa Vanniar* v. *Vengusamy,* (1978) 2 M.L.J. 393.
4. *K.C.P. Employees' Association, Madras* v. *Management of K.C.P. Ltd.,* (1978) 2 S.C.J. 49 : A.I.R. 1978 S.C. 474.
5. (1978) 2 M.L.J. 48.

1. (1978) 1 M.L.J. 382.
2. (1978) 1 M.L.J. 1.
3. (1978) 2 M.L.J. 540.
4. (1978) 2 M.L.J. 27.

provides the light and the manifestations of various shades are found in Articles 15, 16 and 29; Article 14 is the genus relating to equality while the other Articles are the species; Article 29 alone does not govern the right of a person to seek admission to an educational institution and an administrative direction has to stand the test of each and every fundamental right, be it Article 14, 15 or 16; that reservation of seats being made in favour of the wards of Central Government employees or on the ground of residence to enable the local residents to have higher education without much difficulty would be intelligible, but merely because a person was born in Pondicherry long ago if he is enabled to get classified under the Pondicherry general seat, that will be unreasonable and the vice in allowing candidates to enter the compartment of 'Pondicherry General' on the ground of place of birth is clearly violative of Article 15. *State of Tamil Nadu* v. *M/s. National Trading Co.*[1], lays down that when once the Court had allowed a writ petition the rights accrued to the petitioner had to be worked out only by way of executing the orders passed by the Court in the writ petition and no suit can be filed based on those orders; when the Court delivers a judgment deciding to issue a writ of *mandamus*, it is followed by a writ absolute issued by the Court served on the respondent to the writ petition and therefore, there is a decretal order in the writ petition and that decretal order has to be executed; the analogous provisions contained in Order 21, rule 32, Civil Procedure Code will clearly apply to such cases and a writ of *mandamus* issued by the Court is in the nature merely of a mandatory injunction issued by the Court. In *Guruviah Naidu and Sons* v. *State of Tamil Nadu*[2], the Supreme Court points out that Article 304 (*a*) of the Constitution does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State and the question as to when the levy would constitute discrimination would depend on a variety of factors including the rate of tax and item of goods in respect of the sale of which it is levied. *Srinivasan* v. *Government of Tamil Nadu*[1], on relegation by a Division Bench for disposal on merits of the writ petitions before the Bench by a Single Judge in the light of its remarks, stressed the law and its conclusions thus : that the relationship between the Government and its servants is essentially that of a master and servant excepting that certain protections are afforded under Articles 310 and 311 of the Constitution but that would not mean that the law of master and servant would in any way cease to have application, that where the employee entered service on the specific condition that either on attaining the age of 50 years or on completion of 25 years of qualifying service he would be compulsorily retired if the employer comes to such a decision, and if the employer on certain materials comes to that conclusion the Court cannot say that the order of compulsory retirement casts a stigma or is in any way unjustified; that if the order does not cast a stigma there cannot be a search for the stigma by delving into the files; nor would the Court be justified in saying that notwithstanding the materials the employee should be continued in employment. *Lakshminarayanan* v. *Secretary to the Government of Tamil Nadu*[2], reiterates the position as stated *supra* and emphasises that stigma should stem from the order of compulsory retirement and is not to be drawn out by a speculative process by reading into the order any innuendo from other circumstances or possibilities or suspicions. *Venugopalan* v. *Secretary to Government*[3], in applying the aforesaid principles points out that when under Fundamental Rule 56 (*d*) an order of compulsory retirement is passed it cannot and should not be equated to a penal action, that the question is not one of efficiency of the concerned officer and the order of retirement may be for the improvement of the administration. *Ramayee* v. *Muniyandi Konar*[4] expresses the view that in the eye of the law a judgment written by the District Munsif in Tamil is no judgment at all and

1. (1978) 2 M.L.J. 48.
2. (1978) 1 M.L.J. (S.C.) 1.

1. (1978) 2 M.L.J. 161.
2. (1978) 2 M.L.J. 198.
3. (1978) 2 M.L.J. 202.
4. (1978) 2 M.L.J. 442.

until the State Government acts the subordinate civil judiciary in Tamil Nadu will have to go on composing their judgments in a language which is, recognisably English.

Industrial and Labour Law.—In *National and Grindlays Bank Empoyees Union* v. *Kannan*[1]. It is made clear that even if a dispute was an industrial dispute, if it was one arising out of a right or liability under the general common law and not under the Industrial Disputes Act the jurisdiction of the civil Court would not be ousted and that an agreement between the employer and the workmen arrived at otherwise than in the course of conciliation proceedings would not be a "settlement" within the definition of section 2 (*p*) of the Act unless a copy thereof had been sent to an officer authorised by the appropriate Government. *Kasturi Mills Ltd.* v. *R. M. Veerappan*[2], holds that the principle is clear that in the case of a contract for a fixed period, in the absence of a provision in the notice, an employee is entitled to damages on the same salary and allowances for the unexpired period of the contract if the contract was terminated during its currency; but where there is provision for a period of notice, then the damages will be awardable only to the extent of salary and allowances for the notice period. *Kannan* v. *Union of India*[3], states that casual labourers on railways could not be called railway servants in view of rule 102 (13) of the Indian Railway Establishment Code, Volume I and the fact that their services were not terminated by reason of mistake the moment they were medically declared unfit but were allowed to continue for some time more does not cast any obligation on the part of the Railway to find alternative employment for them.

Contracts and ancillary laws.—In *Manickam Chettiar* v. *Madras City Municipal Corporation*[4], it is pointed out that it was a mandate of the law that an agreement not supported by consideration was unenforceable, and the mandate could not be defeated by contending that the party against whom the agreement was sought to be enforced entered into the same with the knowledge that there was no consideration or that the consideration provided for was unreal or illusory. *N. V. P. Pandian* v. *M. M. Roy*[1], lays down that the law will not uphold an agreement whereby a person has agreed to use his influence or position for the purpose of securing a title, contract or some other benefit from the Government (in the instant case a seat in the Medical College); the public has a right to demand that public officials shall not be induced merely by consideration of personal gain to act in a manner other than that which the public interest demands; and the maxim *in pari delicto potior est conditio possidentis* will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract to recover it back, for the Courts will not assist an illegal transaction in any respect. *Salem Chemical Industries* v. *Bird & Co., (P.), Ltd.*[2], decides that where there are two or more competent Courts which can entertain a suit on a contract consequent upon a part of the cause of action having arisen within the jurisdiction of each of these Courts, the parties to the concerned transaction can agree to vest jurisdiction in one of such Courts to try disputes which might arise as between themselves and such an agreement would not be hit by section 28, Contract Act, as being opposed to public policy. Such an agreement, however, to exclude the jurisdiction of one Court and to confer exclusive jurisdiction on another Court in whose jurisdiction also part of the cause of action arose should be clear, unambiguous and explicit. *Savamalai Estates* v. *Kannayan*[3], expresses the view that since a lease is as much a concluded contract as a sale and there is nothing executory about it Courts have not applied section 56, Contract Act to leases though section 3, Transfer of Property Act, provides that the chapters and sections of the Act which relate to contracts should be taken as part of the Contract Act; that where parties to a contract agree beforehand what sum shall be payable by way of damages in the event of a breach, the sum

1. (1978) 2 M.L.J. 59.
2. (1978) 2 M.L.J. 289.
3. (1978) 2 M.L.J. 7.
4. (1978) 1 M.L.J. 371.

1. (1978) 2 M.L.J. 417.
2. (1978) 2 M.L.J. 189.
3. (1978) 1 M.L.J. 424.

fixed may be a genuine pre-estimate of the loss that may be caused to one party if the contract is broken by the other in which case it is called liquidated damages, or the sum fixed may be in the nature of a threat held over the other party *in terrorem*, a security to the promisee that the contract will be performed in which case it is called a penalty which has long been subject to equitable jurisdiction; that the plaintiff who brings an action for the enforcement of a penalty can recover compensation only for the damage that he has in fact suffered; that a penalty covers but does not assess the damages and section 74 of the Contract Act authorises the Court to award compensation not exceeding the amount of penalty stipulated for. *Ramaswamy Gounder* v. *Kuppuswami Gounder*[1], clarifies that the undertaking to pay a sum of money or to forfeit a sum of money fixed *in terrorem* without reference to any estimated damages on breach of the contract being in the nature of a penalty, the party claiming compensation must prove the loss suffered by him; that the stipulation is relevant only to fix the maximum amount that could be awarded against the party in breach and that on proof of the actual damages suffered to that extent the amount already paid may be allowed to be retained. *Moorthy* v. *Kothandaraman*[2] holds that a promissory note can be stamped either with adhesive stamps or engrossed on a stamp paper of proper value. *Thirunavukkarasu Mudaliar* v. *C. S. Rajam & Co.*[3] states that a promissory note need not be attested and that even if the name of an attesting witness has been introduced after the execution of the instrument in proper and due form, such induction of the name of the attesting witness would not make it an unenforceable instrument on the ground that it has been materially altered. It is also not open to a defendant in an action on a negotiable instrument to plead that the accounts as between himself and the plaintiff ought to be reopened to find whether the consideration recited in the negotiable instrument is correct or not. *Leelavathi* v. *Durairaj*[4] expresses the view that where *prima facie* it appeared that the concerned creditors could not have met the debtor at all and the transactions were put through a finance broker an investigation being needed whether the promissory note in question was supported by consideration or not, the usual presumption which would arise under section 20 of the Negotiable Instruments Act was not invokable.

Property Law, Land Tenures and Tenancy Law, and related Legislation.—In *Ramaswami Naidu* v. *Shyamala Devi*[1], it is elucidated that co-ownership is a relationship which springs and slopes from consensus and contract; Legislation has only imprinted on the concept of co-ownership certain rights which have a supervening effect which are declaratory of the rights *inter se* as between the co-owners; the legal relationship is always knitted in a framework of jointness and no one therein can predicate with certainty as to what portion of the property held in common is his, and an element of inseparability is inhered in the doctrine of co-ownership; what can be predicated by reason of section 45 of the Transfer of Property Act and by invoking the principle of quasi-trust in the Indian Trusts Act is the quantum of rights of such co-owners in the entirety of the property and it is for the purpose of providing a just rule for weighing and appreciating the value of interest of a co-owner in joint property that the rule of equity is involved in section 45 of the Transfer of Property Act. *Palanivelu* v. *Veradammal*[2] holds that, where a trespasser on land was putting up a structure and nothing was done by the owner to stop it and the facts justified an inference of acquiescence on his part, the trespasser need not be ordered to deliver possession of the trespassed portion to the owner; the owner can be compensated in money for the value of the trespassed portion. *Eni Ammal* v. *Soosai Michael Mudaliar*[3] points out that the doctrine of *lis pendens* applies to involuntary sales and merely because a money-decree-holder was not *eo nominee* a party to the

1. (1978) 2 M.L.J. 313.
2. (1978) 2 M.L.J. 294.
3. (1978) 2 M.L.J. 352.
4. (1978) 2 M.L.J. 459.

1. (1978) 1 M.L.J. 505.
2. (1978) 1 M.L.J. 212.
3. (1978) 1 M.L.J. 146.

decree in a maintenance suit creating a charge for maintenance on the disputed properties he cannot claim that he is not bound by the decree and it will be idle on his part to contend that he was a *bona fide* purchaser for value without notice of the charge inasmuch as the charge had been prayed for even before the date of his suit. *Chinna Thevar* v. *Gnanaprakasi Ammal*[1] expresses the view that where a lessee obtained a contract of sale of the property occupied by him from his landlord, and after the date of the contract and after it was performed in part by consideration being paid for the contract the landlord allowed the tenant to continue in possession by reason of the new status created under the contract, it was not open to the landlord to contend that the right of possession claimed by the tenant was referable to the lease; the conditions laid down in section 53-A of the Transfer of Property Act are fulfilled even though a contract to sell alone had been obtained. *Singaravelu* v. *Govindasami Chettiar*[2] decides that a tenant in occupation of an item of property subject to a simple mortgage has an interest in the equity of redemption and will be one of the persons entitled to subrogation under section 91 of the Transfer of Property Act. *Ranganatha Naidu* v. *Senthamarai*[3] explains that though under section 92, any co-mortgagor on redeeming the property subject to the mortgage has so far as regards redemption, foreclosure or sale of such property the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee, the rule of subrogation does not entitle the redeeming co-mortgagor to claim to be the mortgagee but it entitles him to seek reimbursement of whatever money he has spent before possession is sought to be recovered from him by the other co-mortgagor and the right of the redeeming co-mortgagor is only to claim the amount which was actually spent before surrendering possession.

Jumma Mosque v. *Sulaiman Sheriff*[4] points out that the use of the expression *dharmadayam* or *devadayam* in an inam grant though relevant is not conclusive as to the scope of the grant; the matter will have to be decided in the light of the language employed either in the inam grant or in the entries in the inam register; where the inam was confirmed "so long as he continues to do service" it is personal and where it was confirmed "so long as the service is performed" it is in favour of the institution; and the entries in columns 8 and 10 of the Inams Register would be particularly relevant to show whether the inam is a service inam or it is in favour of the institution.

1. (1978) 2 M.L.J. 533.
2. (1978) 1 M.L.J. 276.
3. (1978) 2 M.L.J. 267.
4. (1978) 2 M.L.J. 99.

Sethuraman v. *Authorised Officer*[1] decides that for claiming exemption under section 73, clause (8) of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act as land exclusively used for growing fuel trees the landowner must have consciously indulged in the cultivation and growing of fuel trees in the lands concerned and no spontaneous growth or sporadic growth will warrant the invocation of the exemption clause, for the potentialities of the land being converted into cultivable lands cannot be ruled out. *Deivasigamani Gounder* v. *Authorised Officer*[2] states that section 74 of the Act contemplates that in addition to the ceiling area a person will be entitled to hold lands used exclusively for grazing purposes up to a particular extent; the section never provided for the exclusion of grazing lands from the holding of a person for the purpose of arriving at the ceiling area; the ceiling area should be arrived at by taking into consideration all the holdings of land within the meaning of the Act and after arriving at the ceiling area, the person should be allowed the additional extent up to the prescribed limit on the ground that they are grazing lands.

Insolvency Law.—In *Bandi Chalapathi Rao* v. *Official Assignee*[3], it is held that the residuary power in the Insolvency Court to decide all questions of priorities and all other questions whatsoever, whether of law or of fact which may arise in any case of insolvency coming within the cognisance of the

1. (1978) 2 M.L.J. 230.
2. (1978) 2 M.L.J. 450.
3. (1978) 1 M.L.J. 316.

Court or which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case is provided for expressly in the statute; the very vesting by the legislature in the Insolvency Court of a manifest jurisdiction to consider all questions in the name of expediency and convenience makes the objective which section 7 of the Presidency Towns Insolvency Act serves obvious; that it is not only to afford speedy justice either to the official assignee as representing the body of creditors or to a creditor of the insolvent under certain circumstances, but the way it runs through the process created reflects on the main aspect, namely, that the Insolvency Court is expected to render complete justice while adjudicating on the matters which come before it for decision. *Dev Traders* v. *Deenadayalu*[1] states that in order to constitute a fraudulent preference the act of the debtor should be voluntary, a deliberate and spontaneous act, an act of free will; payment under pressure, legal or illegal is not a voluntary act; fraudulent preference implies a deliberate discrimination between creditors; if the dominant intention of the debtor is to benefit himself, then the payment to one creditor alone would not constitute an act of insolvency. *A. V. Iron Traders* v. *Jamandas*[2] lays down that the mere expression of a desire to postpone the payment of debts because of circumstances connected with one's business would not be an act of insolvency within the meaning of section 9 (*g*) of the Presidency Towns Insolvency Act. *S. K. Kushiram* v. *Kamadhenu Drinks*[3] explains that the essence of an act of insolvency under section 9 (*g*) was that the debtor should give sufficient indication to show that he had suspended payment of all the debts; no particular form of expression was necessary; what was necessary was that the words should unmistakably leave the impression in the mind of the creditor that the debtor actually suspended or was about to suspend payment of all his debts; the words used by the debtor should be reasonably construed; a creditor could not approach the Court with a petition for insolvency by merely misundersanding what was stated by the debtor. *Syed Ismail* v. *Abdul Salam*[1] holds that by reason of section 41 (2) of the Provincial Insolvency Act, a Court can grant an order of discharge subject to any conditions with respect to any earning or income which may afterwards become due to the insolvent or with respect to his having acquired property; the Insolvency Court has however no power while refusing to grant a discharge under section 41 (2) to direct the insolvent to pay any amount every month to his creditors.

1. (1978 2 M.L.J. 348
2. (1978) 2 M.L.J. 356.
3. (1978) 1 M.L.J. 149.

Hindu Law and related Legislation.—In *Ethirajammal* v. *Lakshmi Devi*[2], it is pointed out that in the case of a property which is in the nature of a business there is no presumption in Hindu law that the business is a joint family business even when the member carrying on the same is the manager or the father unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family or the joint family funds; the property in the hands of a sole-surviving coparcener though free from certain limitations as regards alienations retains the characteristic of joint family property; therefore if there is a detriment to the property even at the time when the mortgagor was the sole surviving co-parcener the business or other acquisitions made in consequence of such detriment would have to be treated as joint family property; effecting a mortgage and taking a loan on its security without more cannot be considered as effecting any detriment to the joint family property; *Kumaraswami Gounder* v. *Subba Gounder*[3] expresses the view that if at a family council the joint family members exercise their minds and carve out certain properties of the family for purposes of allotment to each of the branches and allot them to such of those sharers who are entitled thereto in lieu of their maintenance and the maintenance of their branch the income derived from the possessed properties would be their own, they would not in any sense be accountable for such income to the other members of the family; but if by a

1. (1978) 1 M.L.J. 160.
2. (1978) 2 M.L.J. 504.
3. (1978) 1 M.L.J. 305.

domestic arrangement a certain unit of a joint family or an individual takes charge of certain carved out properties he cannot plead that the properties were allotted to him in the realistic sense of the word so as to avoid his responsibility to account for the income from such properties which he derived by reason of his enjoyment. *Ranganayaki Amal* v. *Srinivasan*[1] lays down that properties standing in the names of the female members in a joint family are their own unless clinching proof to the contrary is adduced by the challenging member; it is not for the female member to prove how she acquired the same; likewise in ordinary cases also where a plea of benami is set up it is for the person so pleading to show that the properties standing in the name of the other coparceners are joint family properties which stemmed from the joint family nucleus; such nucleus has to be established as a matter of fact and it cannot normally be either presumed or assumed on probabilities; the burden is very heavy on the plaintiff to establish the existence of joint family nucleus; mere lapse of time will not relieve him from discharging his obligation. *Ethirajammal* v. *Lakshmi Devi*[2] states that a suit for partition does not stand out as a different category as far as onus of proof is concerned; the plaintiff has first to *prima facie* establish his or her case of the property being a joint family or self-acquired property; in the case of joint family property it is enough if the plaintiff proves that the joint family had certain properties which from their nature and relative value may have formed the nucleus from which the property in question may have been acquired; if so much is established then the burden shifts to the other side alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property: *Chellammal* v. *Valliammal*[3] is a reminder that under Hindu Law co-widows can put an end to the right of survivorship and in case there had been a final and absolute partition by metes and bounds between them there would be no further right of survivorship between the two. *Dharma Raja* v. *Rama Amamal*[4] points out

1. (1978) 1 M.L.J. 58.
2. (1978) 2 M.L.J. 504.
3. (1978) 1 M.L.J. 391.
4. (1978) 1 M.L.J. 492.

that the mere execution of a deed of gift or an instrument is not enough to constitute a valid endowment; it is necessary that the executant shall divest himself of the properties in favour of the donee; in cases where there is no dedication but only a creation of perpetuity in favour of one's own descendants, the alleged gift in favour of the idol or religious or charitable institution becomes void; a dedication may be absolute or partial; in the former case the properties are given out and out to the idol or institution and the donor divests himself of all beneficial interest in the properties comprised in the endowment and in the latter case a charge is created on the properties or there is a trust to receive and apply a portion of the income for the religious or charitable purposes. According to *Doraikannu* v. *Natesa Pillai*[1] to ascertain whether a dedication is partial or absolute the instrument as a whole has to be taken and the intention has to be gathered only from the words used; if for the maintenance of public charity a minor portion of the income is required to be used and a substantial surplus is left with the manager for his own private purposes there would not be a complete dedication but if the charity is given a substantial part of the income then the dedication would be a complete one.

In *Ponnuthayee Ammal* v. *Kamakshi Ammal*[2], it is pointed out that whether an application for nullity of marriage under the Hindu Marriage Act, filed by a spouse is for establishing the invalidity of the marriage for its own sake or for the collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that it is not necessary that the other spouse should be living. The impact of the Marriage Laws (Amendment) Act, (LXVIII of 1976) on the Hindu Marriage Act, is considered in *Chinnathayi* v. *Narayanaswami Kounder*[3], where it is made clear that under section 39 of the 1976 Act all petitions and proceedings in causes and matters matrimonial pending in any Court at the commence-

(*to be continued*)

1. (1978) 2 M.L.J. 296.
2. (1978) 1 M.L.J. 498.
3. (1978) 1 M.L.J. 49.

ment of that Act shall be dealt with by such Court, if it is a petition or proceeding under the Hindu Marriage Act, then so far as it may be, as if it had been originally instituted therein under the Hindu Marriage Act as amended by the Act of 1976; that the amendment of section 15 of the Hindu Marriage Act, by reason of section 39 of the 1976 Act, had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and these pending proceedings are to be decided only according to the amended provisions and hence section 15 of the Hindu Marriage Act will have to be read as if there is no proviso; and that where after the dissolution of her marriage the first plaintiff had married the deceased *R* though within a period of one year from the date of dissolution, the marriage was legal and valid and she and her two children born of her marriage with *R* were therefore entitled to inherit the property of *R* on his death.

The nature of a Hindu widow's right to maintenance and the impact of section 25 of the Hindu Adoptions and Maintenance Act where maintenance has been fixed by agreement or decree of Court are elucidated in *Muthammal* v. *Raja*[1], where the Court pointed out that the right of maintenance of a wife is a personal right, an incident of the status of matrimony; that the obligation is personal in character arising from the existence of the relationship between the parties; that the party who stands to benefit by the Act can keep that right and enforce the same or throw it away; that if the right is given up or relinquished completely in consideration of a lump sum or consolidated payment, the maintenance-holder cannot agitate her claim over again unless the contract of relinquishment is attacked as vitiated by undue influence or fraud; but if the right to maintenance is given up in receipt of a consolidated amount under an agreement with a stipulation not to ask for more but without relinquishing her subsisting right the position will be different and in such contingencies the Court has to see whether after the coming into force of the Act the wife or the widow can claim enhanced or increased maintenance in view of the changed circumstances justifying her claim; that section 25 of the Act enacts a beneficial social legislation and must be given a liberal and benevolent construction; that section 25 is a complement to section 18 which gives a statutory right to a Hindu wife to claim maintenance; that section 25 has been enacted only to protect widows and other maintenance-holders so that they may not be deprived of their right to ask for increased maintenance when there is a material change in the circumstances on the ground that the amount of maintenance has already been fixed either by a decree of Court or by an agreement.

1. (1978) 2 M.L.J. 71.

Chellammal v. *Valliammal*[1], expresses the view that if a female Hindu does not have a pre-existing right to a share and she is not given property in lieu of maintenance or arrears of maintenance, but still property is given to her under a partition deed it would be a case of pure gift; the mere fact that the property is given to the female Hindu under a partition deed would not mean that she did not acquire the property by way of gift and that she so acquired "at a partition"; the words "acquired by a female Hindu...... at a partition" in section 14 of the Hindu Succession Act do not mean that she should not have had any pre-existing right in the property.

Law of Evidence.—That a statement made in a horoscope need not necessarily be made at about the time of the birth of the child to attract section 32 (5) of the Evidence Act is recognised in *Secretary to Government, Home Department* v. *T. V. Hari Rao*[2], and it is made clear that even if it is made subsequently it would be admissible provided it had been made before the question in dispute was raised. The scope of section 44 is examined in *Thiagarajan* v. *Mohammed Umar Sait*[3], and it lays down that the section relates to procedure and does not confer any right on a party; that a party cannot move the Court under that section; that if a judgment was sought to be relied upon in a proceeding it

1. (1978) 1 M.L.J. 391.
2. (1978) 1 M.L.J. 460.
3. (1978) 1 M.L.J. 5.

is open to the party to contend that the judgment was obtained by fraud, which is far from saying that a Court had jurisdiction to set aside a decree under this section at the instance of one of the parties even if it was obtained by fraud. *S. G. Desai* v. *Government of Pondicherry*[1], states that the doctrine of estoppel is excluded where it is found that the authority against whom estoppel is pleaded has owed a duty to the public against whom the estoppel cannot fairly operate.

Law of limitation.—In *Asi Bai* v. *Gomathi*[2], it is held that a guiding principle in exercising judicial discretion is that where after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of appeal does not exceed the period prescribed for preferring an appeal, the appellant ought to be deemed to have acted with reasonable diligence in presenting the appeal. *State of Tamil Nadu* v. *M/s. National Trading Co.*[3], holds that when the High Court dismissed a petition for contempt it cannot be said that the Court dismissed the same for defect of jurisdiction or other cause of a like nature within the meaning of section 14 (1) of the Limitation Act; further the words "another civil proceeding" referred to in section 14 (1) must be against the defendant. *Krishnamurthy* v. *Narayana Pillai*[4], lays down that in order to apply section 15 there must be an injunction or an order staying the execution of the suit; the test is in such cases whether if a party filed a suit he would be in contempt of Court; to contend that any suit if filed would only be futile is unavailing inasmuch as the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation. *Retnamma Pillai Thankachi* v. *Kamalam Mudaliar*[5], states that an acknowledgment made by one of the mortgagees would not give a fresh starting point of limitation under section 20 for a suit for redemption. An interesting point is elucidated in *Chockalinga Mudaliar* v. *Manivanna Pillai*[6], which decides that the term 'local law' in section 29 (2) should be understood in the context of the Limitation Act being an all-India enactment and in that context any law having currency only in a limited area should be regarded as a local law; hence the law of limitation in the French Civil Code has to be regarded as a local law as it applied in the former French establishments of Pondicherry and not anywhere else in India. *Abraham* v. *Abraham*[1], points out that to be called a mutual, open and current account within the meaning of Article 1 there should be independent transactions resulting in possibility of reciprocal demands and shifting balances and the entries should not be mere repayments of advances already received. *Jamalabuddin* v. *Abdul Kader*[2], states that there seem to be two views as to whether the provisions of the Limitation Act apply to applications for mesne profits pursuant to the directions in the preliminary decree, one view being that the statute applies, the better view being however that there is no such thing as limitation for such applications, since they cannot be regarded as execution petitions for the suits in which they are filed would be still pending at the time they are filed; and that even otherwise the only Article capable of application is Article 137.

Civil Procedure Code.—In *State of Tamil Nadu* v. *M/s. National Trading Co.*[3], it is made clear that as far as the procedural law of the country is concerned except with regard to foreign judgments provided for in the Civil Procedure Code with reference to all other judgments they cannot constitute an independent cause of action enabling a person to file a suit and that so long as there is no machinery in the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act for the purpose of finding out whether an inam grant is a personal grant or in favour of an institution, it is held in *Jumma Mosque* v. *Sulaiman Sheriff*[4], that the civil Court will have jurisdiction to entertain a suit for the purpose.

1. (1978) 1 M.L.J. 517.
2. (1978) 2 M.L.J. 441.
3. (1978) 2 M.L.J. 48.
4. (1978) 2 M.L.J. 412.
5. (1978) 1 M.L.J. 186.
6. (1978) 2 M.L.J. 544.

1. (1978) 1 M.L.J. 381.
2. (1978) 2 M.L.J. 455.
3. (1978) 2 M.L.J. 48.
4. (1978) 2 M.L.J. 99.

Chandra Rao v. *Harisabam Theertha Easwarar Temple*[1], decides that where a former suit had been decreed in favour of a party but the judgment also contained an adverse finding against him, in a subsequent suit for canvassing that finding it could not operate as *res judicata* between the same parties; and the right approach is to examine the record of the former suit and see if what the Court has rendered therein is a determination which decides an issue between the parties and is not a mere finding which is only by the way, in the sense that it does not affect one way or the other the Court's decision on any issue in the suit. The scope of section 92, Civil Procedure Code, is vividly elucidated in *Kumudavalli Ammal* v. *Purushotham*[2], which states that section 92, which operates as a shield against the mismanagement of a public trust whether charitable, religious or otherwise, is as far as possible exhaustive so as to afford protection for the due and proper maintenance and upkeep and processing of public trusts and to guard as against mismanagement, misappropriation and wild indulgence by those who are for the time being enjoined to administer such trusts; the infringement of private rights is outside the scope of inquiry under the section; as long as it is apparent from the pleadings and the evidence let in a particular action that the suit was not for the vindication of personal or individual rights but the suit was brought in a representative capacity for the advancement of the objects of the trust there can be no bar to the maintainability of such a suit; it should be established that the persons complaining against the administrators of the trust have a *real* interest *in presenti* and not a mere sentimental interest; the interest should be real, substantive and an existing interest and not a mere remote, fictitious or contingent one; a person in order to lay a suit under section 92 should plead and establish that he has some tangible interest towards the maintenance and progress of the public trust; a resident of the locality who has some nexus or connection with the trust in the sense that he has interest in its well-being and prosperity can under certain circumstances be taken to be a person having an interest in the trust; in the case of a temple a fair presumption of the existence of such a right in a person can be raised in the case of a resident in the locality who visits the temple and who takes part in the essential rituals and religious functions; in the case of a public school such presumption could also be raised if he is an old student of the school, and if he is also a resident of the locality in which the school is situate he is doubly justified to lay an action along with another under section 92; and what has to be primarily established is, (*i*) that the suit relates to a trust created for a public purpose, (*ii*) it should contain allegations against the person in breach of trust, misappropriation or mismanagement and (*iii*) the necessity in the particular circumstances of a given case for administration of the trust by a body other than the body in management. *Srinivasan* v. *Krishnamurthy Sarma*[1], recognises that the plaintiff as a person interested in the trust, though he might not be residing in the village where the trust property concerned was situate was entitled to maintain the suit. *Jaffer Kermani* v. *Hassan Kermani*[2], expresses the view that if a suit did not fall within the ambit of section 92 (1) it is not hit by the provisions of sub-section (2) thereof. *Lakshmanan Chettiar* v. *Karuppan Chettiar*,[3] states that it is by now recognised that even insufficiency or inadequacy of evidence referred to by the trial Court and the appellate Court in coming to a concurrent finding of fact concerning an issue in a case is a matter which is entirely within their scope, jurisdiction and decision and cannot even be agitated in second appeal. *Ramu Reddy* v. *Sampath Reddy*[4], lays down that while an appeal to the High Court against the order of an appellate Judge granting a temporary injunction which itself was passed in an appeal against the trial Court's order dismissing a petition under Order 39, rule 1 will not lie in view of section 104 (2), where however the order appealed against in the High Court was not passed in appeal preferred under Order 43, rule 1 but was passed in appeal preferred under section 96, the civil miscellaneous

1. (1978) 2 M.L.J. 301.
2. (1978) 1 M.L.J. 261.

1. (1978) 1 M.L.J. 452.
2. (1978) 1 M.L.J. 103.
3. (1978) 2 M.L.J. 364.
4. (1978) 2 M.L.J. 236.

appeal is not barred by section 104 (2). *Ramanujam Chettiar* v. *Arunachaleswarar Devasthanam*[1], decides that the question of the jurisdiction of the Court goes to the root of the matter, and it was open to the petitioners to raise the question for the first time before the High Court in revision. *Alvel Sales* v. *Dujodwala Industries*[2], cautions against mechanical adoption or invocation of the provisions of the Civil Procedure Code when dealing with substantive provisions under the Arbitration Act and points out how though section 142 of the Code expressly lays down a mandate that all notices and orders given to or served on any person under the provisions of the Code shall be in writing, the Supreme Court, in interpreting the term 'notice' in section 14 (2) of the Arbitration Act, has expressed itself very clearly that such a notice need not be in writing. *Ramalingam* v. *Mahatma Gandhi T. B. Sanatorium*[3], clarifies that the nature and function of an order of restitution are the same as those of a decree, that where the restitution is for payment of money it has got the same effect as a decree for money, and that where such an order for restitution is sought to be executed the executing Court has no jurisdiction to question the order of restitution or go behind the said order. *Usman Koya* v. *Muthukrishnan*[4], recognises that though section 151 does not by itself apply to proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act the Rent Controller as a quasi-judicial tribunal has power to rectify his mistake. *Aruppukottai Sri Jaya Vilas (P.), Ltd.* v. *Karuppiah*[5], holds that where a suit is dismissed for failure on the part of the plaintiff to apply for issue of summons to the concerned defendant, if in fact the presence of the defendant is necessary for a proper adjudication of the questions that would arise for consideration in the suit, the Court has ample powers to implead the very same defendant as a party to the suit by exercise of powers under Order 1, rule 10 (2). *Lakshmanan Chetty* v. *Askar Ahmad*[6],

1. (1978) 1 M.L.J. 432.
2. (1978) 1 M.L.J. 171.
3. (1978) 2 M.L.J. 404.
4. (1978) 1 M.L.J. 10.
5. (1978) 2 M.L.J. 227.
6. (1978) 1 M.L.J. 342.

expresses the view that an assignor-original-payee of a promissory note is a proper party to an action laid on the promissory note. *Goodu Sahib* v. *Rakiabi*[1], points out that in the case of undue influence particulars have to be set out in the pleadings with dates and items, if necessary, as required by Order 6, rule 4. *Shantilal* v. *Sankarasubbu Mudaliar*[2], expresses the view that the provisions of Order 20, rule 11 as amended in Madras do not supersede the provisions of Order 34, rule 4; hence where the decree-holder had filed a suit on a mortgage and obtained a preliminary decree under Order 32, rule 4 inasmuch as the decree is not a money decree an order allowing an application for permission to pay the decree amount in instalments is without jurisdiction. *Nantha* v. *Ramalingam Pillai*[3], serves to remind that as a result of the amendment of Order 21, rule 29 by the Central Act CIV of 1976 the Court acquires the competency to stay not only a decree which it passed but also a decree which had been transferred to it for execution though passed by another Court. The decision in *Southern Steelmet & Alloys Ltd.* v. *B. M. Steele, Madras*[4], throws into focus the drastic changes in the "literature", the mode of approach and the method by which a decision should be arrived at and which should be adopted by a Court when an application under Order 21, rule 58 comes up for adjudication, consequent on the amendments to the Civil Procedure Code by Central Act, CIV of 1976. It states that while under the earlier law such an investigation of claim and objection to attachment of property was summary in nature the present law provides, as it were a significant departure in the matter of disposal and adjudication of such claims; the Order contemplates a full enquiry into all questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the Court enquiring into such a claim petition shall determine such questions; there is also an embargo on the institution of a separate suit for the determination of such questions and sub-clause (4) of Order 21, rule 8 sheds

1. (1978) 2 M.L.J. 426.
2. (1978) 2 M.L.J. 229.
3. (1978) 1 M.L.J. 344.
4. (1978) 1 M.L.J. 468.

abundant light on the nature and character of the decision ultimately to be arrived at by a civil Court on such adjudication under Order 21, rule 58; it says that after the claim or objection has been adjudicated upon, the order made thereon shall have the same force and be subject to the same condition as to appeal or otherwise as if it were a decree; though perforce an order is contemplated to be passed under Order 21, rule 58 that order has the legal effect of a decree; such an order is a substitute for a decision resulting in a decree in an ordinary litigation; such being the intendment of the amended rule under Order 21, rule 58 the enquiry contemplated under that rule is no longer of a summary nature but should be full, realistic, and after giving adequate opportunity to the parties concerned to prove their respective claims, rights, title and interest, in the properties attached. *State Trading Corporation* v. *Vaidyalingam*[1], makes it clear that when a legal representative is brought on record under Order 22, rule 4 his status and rights will be the same as those of the person who died in whose place he has come on record, whereas the rights and obligations of a person impleaded as a partv under Order 1, rule 10 will not be so circumscribed but will be different and independent. *Charles Samuel* v. *Board of Trustees*[2], states that the grant of leave to withdraw a suit would always be a matter for the discretion of the Court under Order 23, rule 1 and whether the Court was moved under clause (*a*) or clause (*b*) what was invoked for exercise was the Court's discretion. How a Court should proceed *vis-a-vis* a medical certificate of sickness in an application for the appointment of Commissioner to take evidence is indicated in *Lakshman* v. *Ellammal*[3], where it is observed that if the Court feels any doubt about the acceptance of the medical certificate it could call the medical practitioner as witness to find out the truth or otherwise of the averments contained in the certificate; if a registered medical practitioner has opined about the sickness or infirmity of a person it mav not be proper for the Court to brush aside the opinion and come to its own conclusion in the absence of expert medical professional knowledge; in the face of the specific provision to call for the medical practitioner and examine him it will not be fair and proper for the Court to take a different opinion than that expressed by the registered medical practitioner through the certificate. *Balasubramaniam* v. *Purushothaman*[1] holds that Order 33, rule 15 would be attracted only if the earlier petition was dismissed on merits; hence it cannot apply where a prior application for permission to sue *in forma pauperis* was dismissed for default. *Marimuthu Muthiriar* v. *Ayyathurai*[2] expresses the view that the provisions contained in Order 34, rules 7, 8 and 9 contemplating the passing of a preliminary decree first and a final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee; but in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor has in fact deposited the mortgage amount even at the time of the filing of the suit for redemption it is not as if the Court has no jurisdiction to straightaway pass a decree for redemption without passing a preliminary decree and waiting for an application for a final decree to be filed. *Kamalanathan* v. *E. I. D. Parry Ltd.*[3], lays down that where in a suit on a promissory note the Judge came to the conclusion that there was a triable issue, if he wanted to impose any condition he should assign reasons as to why he was imposing the condition notwithstanding his conclusion that the controversy gave rise to a triable issue. *Salammal* v. *Mannangatti*[4] points out that when the appellant does not appear either by himself or or through counsel when the appeal is called for hearing, the Court may either adjourn it or dismiss it for default; in such a contingency it is not open to the Court to decide it on merits and dismiss it; if such an order is passed it can still be considered to be an order under Order 41, rule 17; to set at rest the controversy as to whether the Court has the power under Order 41, rule 17 to dismiss an appeal on

1. (1978) 1 M.L.J. 345.
2. (1978) 2 M.L.J. 243.
3. (1978) 2 M.L.J. 280.

1. (1978) 1 M.L.J. 187.
2. (1978) 1 M.L.J. 169.
3. (1978) I M.L.J. 25.
4. (1978) 2 M.L.J. 277.

merits in default of appearance by the appellant, an amendment has been made by the Act (CIV of 1976), by adding an *Explanation* and the dismissal of the appeal in the absence of the appellant and his counsel cannot be equated to the dismissal of the appeal on merits but it must be equated to an order of dismissal for default and if it is so, against such an order a remedy under Order 41, rule 19 is available.

Criminal Law and Criminal Procedure.—Apropos the death penalty, in *Srirangam* v. *State of Tamil Nadu*[1], the Supreme Court reminds us that the winds of penological reform notwithstanding, the prescription in section 302, Penal Code binds and death penalty is still permissible in the punitive pharmacopeia in India. Anent the imposition of a sentence of heavy fine with the sentence of death or life imprisonment, in *Palaniappa Gounder* v. *State of Tamil Nadu*[2], the Supreme Court pointed out that there can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine under section 302 of the Penal Code; legitimacy is not however to be confused with propriety; before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and, if so what is a proper or adequate fine to impose in the circumstances of the case, and, since by reason of section 357 (1) (*c*) of the new Criminal Procedure Code and its precursor section 545 (1) (*bb*) of the old Code compensation can only come out of fine, it is always necessary to consider in the first instance whether the sentence of fine is called for particularly when the offender is sentenced to death or life imprisonment; if so, the fine must not be excessive having regard to all the circumstances of the case, the motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine. In *Dr. Ram Chander Singh Sagar* v. *State of Tamil Nadu*[1], the Supreme Court observes that the Code of Criminal Procedure clothes the Supreme Court with power under section 406 to transfer a case or appeal from one High Court or a Court subordinate thereto to another High Court or to a Court subordinate thereto; but it does not clothe the Supreme Court with power to transfer investigations from one police station to another in the country simply because the first information report or a remand report is forwarded to a Court.

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1. (1978) 2 M.L.J. (S.C.) 10.
2. (1978) 1 M.L.J. (S.C.) 13.

1. (1978) 2 M.L.J. (S.C.) 11.